

1 DIEMER & WEI, LLP  
Kathryn S. Diemer, SBN 133977  
2 Susan B. Luce, SBN120843  
55 South Market St., Ste 1420  
3 San Jose, CA 95113  
Tel: 408-971-6270  
4 Fax:408-971-6271  
[kdiemer@diemerwei.com](mailto:kdiemer@diemerwei.com)  
5 [sluce@diemerwei.com](mailto:sluce@diemerwei.com)

6 Attorneys for Interested Party  
Palo Alto University  
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9 UNITED STATES BANKRUPTCY COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN JOSE DIVISION

12 In re:  
13 5150 ECR Group, LLC,  
14 Debtor.

Case No. 21- 51196 SLJ

Chapter 11

15 JOINDER OF INTERESTED PARTY PALO  
16 ALTO UNIVERSITY IN MOTION TO  
DISMISS

17 Time : 2:30 P.M.

Date: October 7, 2021

18 Judge: Hon. Stephen L. Johnson via  
tele/videoconference  
19  
20

21 Palo Alto University [hereinafter cited as “PAU”] is one of the tenants in the building  
22 which 5150 ECR Group, LLC has identified as the sole asset in its single asset real estate case  
23 filed before this Court. On April 22, 2021, Judge Christopher Rudy, Santa Clara County Superior  
24 Court, entered the receivership order appointing a Receiver to take possession of and administer  
25 the property located at 5150 El Camino Real, Los Altos, California [hereinafter cited as “the  
26 Property”] owned by 5150 ECR Group, LLC [hereinafter cited as the “Debtor”]. At the time the  
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1 receivership order was entered, Palo Alto University was essentially at the tail end of the  
2 negotiations for a lease termination agreement with Debtor. The lease termination agreement  
3 between PAU and the Debtor is necessary to allow the Debtor, or any buyer to develop the  
4 property, given the long term nature of PAU's lease.

5  
6 The Receiver, as part of his efforts to market the Property to obtain the highest and best  
7 price, completed the negotiation with PAU. The lease termination agreement is, in essence, a two  
8 part agreement. Funds were placed in escrow to fund the lease termination payment, with  
9 payments to occur upon several milestones. The milestones relate to PAU's exiting the property.  
10 PAU remains as a tenant at the Property for a period of time, while their new premises are  
11 completed. The Receiver has been operating as PAU's landlord, providing property management  
12 services. PAU's agreement is with the Receiver, authorized and approved by Judge Rudy, as  
13 part of the state court action.

14  
15 PAU is filing this joinder in secured creditor 5150 ECR Los Altos, LLC's [hereinafter  
16 cited as "Secured Creditor"] Motion to Dismiss Chapter 11 Case, or in the Alternative Excuse  
17 Receiver from Turnover Requirements of 11 U.S.C. Section 543, for the limited purpose of  
18 supporting the Secured Creditor's request to excuse the Receiver from Turnover.

19  
20 **IT IS IN THE BEST INTERESTS OF THE BANKRUPTCY ESTATE THAT THE**  
21 **RECEIVER RETAIN CONTROL UNTIL SUCH TIME AS THE COURT**  
22 **DECIDES THE ISSUES OF WHETHER OR NOT THE BANKRUPTCY FILING**  
**WAS AUTHORIZED, AND/OR WHETHER THE BANKRUPTCY FILING WAS**  
**IN BAD FAITH.**

23  
24 11 U.S.C. Section 543 requires any custodian of Debtor's assets to turn over those assets  
25 upon the Debtor's filing. The bankruptcy court has both the right, and obligation, to determine on  
26 a case by case basis, to determine who should best be charged with the handling of those assets.  
27 To make that determination the Court is charged with looking solely to the interests of the  
28 creditors, not the debtor.

1 Regardless of what factors are used to aid the court in its decision, the paramount and sole  
2 concern is the interests of all creditors. See generally KCC-Fund V., Ltd., 96 B.R. at 239  
3 (on the issue of who should be in charge of funds held by the receiver, the court stated that  
4 "[o]f necessity, this must be on a case by case analysis and no generic rule can be  
5 proclaimed."). The interests of the debtor are not to be considered in the court's decision.  
6 See *Dill*, 163 B.R. at 225; *Foundry of Barrington P'ship v. Barrett (In re Foundry of*  
7 *Barrington P'ship)*, 129 B.R. 550, 557 (Bankr. N.D. Ill. 1991). Compare 11 U.S.C. §§  
8 523(d) & 305.

9  
10 *In re Falconridge, LLC* (Bankr.N.D.Ill. Nov. 8, 2007, No. 07-bk-19200) 2007 Bankr.  
11 LEXIS 3755, at \*22.

12 The northern district of Illinois bankruptcy court in *Falconridge* characterized the factors to  
13 consider in determining whether to retain the Receiver, or allow the Debtor to control, as follows:  
14 a) likelihood of reorganization, b) whether the debtor mismanaged the property, c) whether  
15 turnover would injured creditors, d) whether debtor would use the property for the creditors  
16 benefit, e) whether rehare are avoiding issues that would be affected because a receiver does not  
17 possess avoiding powers, and f) the fact that the automatic stay deactivates the state court receiver  
18 action.

19 The widely cited *In re Orchards Vill. Invs., LLC* 405 B.R. 341 (Bank. Or. 2009) identified  
20 the main factors as:

21 Reorganization policy generally favors turnover of business assets [\*\*29] to the debtor in  
22 a chapter 11 case. See 5 Collier on Bankruptcy P 543.05 (15th ed. rev. [\*353] 2009). If  
23 turnover is opposed, courts consider a number of factors in determining whether to order  
24 turnover, including "(1) whether there will be sufficient income to fund a successful  
25 reorganization; (2) whether the debtor will use the property for the benefit of its creditors;  
26 and (3) whether there has been mismanagement by the debtor." Id. at 543-12. See, e.g.,  
27 *Dill v. Dime Savings Bank, FSB (In re Dill)*, 163 B.R. 221, 225 (E.D.N.Y. 1994), and  
28 cases cited therein.

*In re Orchards Vill. Invs., LLC* (Bankr.D.Or. 2009) 405 B.R. 341, 352-353. [Hereinafter  
cited as "Orchard Village"]

The Court in *Orchard Village* faced a similar situation to the case at hand. In Orchard Village, a  
Receiver was appointed by a state co urt because of Debtor's failure to make payments on the  
loan, failure to pay taxes, and other payment failures. Additionally, there were questions of

1 mismanagement by the Debtor. The *Orchard Village* court denied turnover, allowing the  
2 Receiver to continue to handle the financial matters of the Debtor's estate. *See Orchard Village*,  
3 *supra* at 34. In *In re Wallace*, 2011 Bankr. Lexis 4382 (Bankr. ID 2011) the Court addressed a  
4 similar situation to the one at hand – a real estate case where the income was insufficient to cover  
5 the costs of operation, combined with concern about Debtor's operational abilities, resulted in the  
6 Court finding that the Receiver should continue in possession, custody and control of the  
7 properties.

8  
9 In *In re Malek & Chahayed Chiropractic Corp.*, 2009 Bankr. Lexis 4511 (Bankr. C.D.Cal.  
10 2009), the Court identified the length of time the receiver had been operating a business before  
11 the bankruptcy was filed, as one of the most compelling factors in determining if the Receiver  
12 should continue post bankruptcy filing.

13  
14 One of the most compelling factors in determining whether a receiver should continue  
15 with a case or if the bankruptcy trustee should take over is how long the receiver has been  
16 operating a business before the bankruptcy was filed. Choice is being run and has been  
17 run for the past ten months by a state court receiver. This state court receiver has worked  
18 to prevent dissipation of Choice's assets and worked towards recovering assets for the  
19 benefit of creditors. Malek claims that the receiver is engaged in a vendetta against him  
20 and is only interested in his own fees. Malek, has, however, never filed these complaints  
21 or even responded on the merits to the receiver's allegations in the Superior Court. Based  
22 on the evidence before this court, there is no evidence to support Malek's claims. David  
23 Pasternak, the receiver, testified and answered all questions any party to these proceedings  
24 put to him. Pasternak is a highly qualified receiver and has been appointed in over 300  
25 receiverships of various kinds and complexities. His testimony was knowledgeable,  
26 credible, fair, and balanced. He has worked with trustees in many bankruptcy cases and  
27 has been left in as a receiver in a number of bankruptcy cases, so he is familiar with how a  
28 bankruptcy case compares to a state court receivership.

23 *In re Malek & Chahayed Chiropractic Corp.* (Bankr.C.D.Cal. Nov. 16, 2009, No. 1:09-  
24 bk-21967-MT) 2009 Bankr. LEXIS 4511, at \*10-11. [Hereinafter cited as "Malek"]

25 Although the *Malek* case addressed a slightly different factual pattern, in that the Court was  
26 determining whether or not the Receiver should stay in place rather than appointing a Chapter 7  
27 trustee, the *Malek* case provides clarity on the considerations before this Court. The Malek court  
28

1 looked to the problems of waste of resources, and duplication of effort where a capable and  
2 experienced receiver had been operating a business for a period of time. The *Malek* court ruled  
3 in favor of allowing the receiver to continue.

4 PAU is concerned that transfer of the property from the Receiver to the Debtor will inhibit  
5 PAU's ability to continue on with its' ordinary course of business during the period of time until  
6 its lease ends. PAU pays it's rent monthly to the Receiver. PAU is moving forward with the  
7 work necessary to leave the 5150 premises, and is hopeful that it will be able to do so early, as  
8 allowed under the Lease Termination Agreement. When ordinary course issues arise, PAU  
9 communicates those to the property manager engaged by the Trustee, as it has done for the last  
10 six months. The documentation which was filed by 5150 was not reassuring that PAU would be  
11 able to continue in its' ordinary course activities as required under the Lease Termination  
12 Agreement. PAU's lease and lease termination agreement were not mentioned in the executory  
13 contract portion of the schedules. 5150 did not identify the tenants, the property manager or  
14 identify monies that would allow the ordinary course activities to continue for the tenants. PAU  
15 asks that this Court, in consideration of PAU, and other interested parties, allow the receiver to  
16 continue in his role.

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18  
19 October 5, 2021

Respectfully submitted,

DIEMER & WEI, LLP

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24 \_\_\_\_\_/Kathryn S. Diemer/\_\_\_\_\_  
25 Kathryn S. Diemer, Esq.  
26 Attorney for Interested Party  
27 Palo Alto University  
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